

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

THE STATE OF TENNESSEE, et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No. 3:21-cv-00308
UNITED STATES DEPARTMENT OF)	
EDUCATION, et al.,)	
)	
Defendants.)	

RESPONSE TO DEFENDANTS' NOTICE OF COMPLIANCE

Plaintiff States respectfully submit this response to Defendants' Notice of Compliance, ECF No. 97. On July 15, this Court ruled that "*Bostock* does not require Defendants' interpretations of Title VII and IX," so Plaintiff States are at least likely to prevail on their claim that the challenged guidance documents are, in fact, legislative rules issued in violation of the APA's notice-and-comment requirements. ECF No. 86 at 31, 40. Accordingly, this Court enjoined "Federal Defendants and all their respective officers, agents, employees, attorneys, and persons acting in concert or participation with them . . . from implementing the Interpretation, Dear Educator Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs." *Id.* at 46.

While Plaintiff States appreciate the steps Defendants have taken to comply with the Court's preliminary injunction, Plaintiff States respond to clarify that it is the Court's preliminary injunction order, not Defendants' "understanding of the scope of the Court's injunction as presented in th[e] Notice" of Compliance, ECF No. 97 at 3, that controls. Plaintiff States object to any implementation by Defendants and persons acting in concert or participation with them of the challenged guidance documents, including implementation of other documents that treat those

challenged documents as binding, against Plaintiff States, including political subdivisions, employers, citizens, and residents within those Plaintiff States' jurisdiction.

First, Plaintiff States agree with Defendants that the Court's preliminary injunction order bars Defendants and persons acting in concert or participation with them from engaging in "investigations, enforcement, or administrative actions" against Plaintiff States "based on" the guidance challenged in this case. ECF No. 97 at 1-2. As in *Texas v. EEOC*, Defendants and persons acting in concert or participation with them "may not treat the Guidance as binding in any respect." 933 F.3d 433, 451 (5th Cir. 2019); *see* ECF No. 97 at 3 (citing *Texas v. EEOC*). Plaintiff States also agree with Defendants that the preliminary injunction also means that Defendants and persons acting in concert or participation with them cannot "cite, reference, treat as binding, or otherwise rely upon the challenged documents in any investigations of claims or enforcement or administrative actions," against Plaintiff States. ECF No. 97 at 2.

To clarify, this Court's preliminary injunction order bars Defendants and persons acting in concert or participation with them from treating the challenged guidance documents as binding in rulemaking that would apply to Plaintiff States. For example, as Plaintiff States pointed out to the Court while their preliminary injunction motion was pending, *see* ECF No. 83, and again when opposing Defendants' proposed indefinite extension of their answer deadline, *see* ECF No. 88 at 5, the U.S. Department of Education issued a proposed rule that relied on the now-enjoined Interpretation. Plaintiff States expect that, to comply with the preliminary injunction order in this case, the final rule will not treat the Interpretation as binding. Further, to comply with the APA after the close of the comment period, the Department must "make appropriate changes" to the proposed rule. *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022). Because the Department's proposed rule was based on the now-enjoined Interpretation, the final rule must

take into account that the Interpretation, in this Court’s words, unlawfully attempted to “create[] rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX, or its implementing regulations.” ECF No. 86 at 41. Plaintiff States will take appropriate action if the Department’s final rule treats the enjoined Interpretation as binding or if Defendants or other parts of the federal government implement the enjoined guidance documents (or other documents based on the enjoined guidance) against Plaintiff States.

Second, this Court’s preliminary injunction does *not* permit Defendants to engage in investigations, enforcement, or administrative actions against Plaintiff States that are “consistent with” agency positions “in the challenged documents” so long as Defendants simply avoid express references to those enjoined directives. ECF No. 97 at 3. This Court’s preliminary injunction was designed to protect Plaintiff States from Defendants’ enforcement of Title VII and Title IX “consistent with the challenged guidance.” ECF No. 86 at 13; *see, e.g., id.* at 22 (“[B]ecause Defendants have pledged to enforce Title VII and Title IX consistent with the guidance, Plaintiffs are left in a quandary.”); *id.* at 32 (“Defendants have left no doubt that they intend to enforce their respective governing statutes consistent with the guidance.”). Defendants cannot circumvent the preliminary injunction by engaging in enforcement actions consistent with the enjoined guidance while strategically avoiding express references to them. *Cf. Sherwood v. Tenn. Valley Auth.*, No. 21-5927, 2022 WL 3584957, at *4-5 (6th Cir. Aug. 22, 2022) (ruling that district court abused its discretion in dissolving injunction when the federal agency promulgated a new but “arguably indistinguishable” policy that “would have the same negative impact on plaintiffs that caused them to seek an injunction in the first place”).

This Court made clear that the “EEOC’s guidance identifies and creates rights for applicants and employees that have not been established by federal law,” ECF No. 86 at 42, and that “the Department of Education’s guidance creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX, or its implementing regulations,” *id.* at 41. Any enforcement action against Plaintiff States consistent with the enjoined guidance, therefore, would be unlawful action based on the enjoined documents; Defendants cannot sidestep the injunction merely by claiming that those enforcement actions are based on “regulations” and “case law” beyond the enjoined guidance. ECF No. 97 at 2. In short, this Court enjoined and restrained the Defendants and persons acting in concert or participation with them “from implementing” the challenged guidance documents against Plaintiff States. ECF No. 86 at 46. That injunction does not allow the Defendants to engage in end-runs around it by simply not referring to the enjoined guidance by name, and Plaintiff States will take appropriate action if Defendants attempt to engage in such enforcement action.

Third, this Court’s preliminary injunction order bars Defendants and persons acting in concert or participation with them from implementing the challenged guidance documents against the entirety of Plaintiff States, including political subdivisions, employers, citizens, and residents within those Plaintiff States’ jurisdiction. ECF No. 86 at 46. The Court ruled that “the challenged guidance documents” injured Plaintiff States by attempting to “‘tell[] them what they can or cannot do’ within their jurisdiction with respect to their treatment of individuals based on sexual orientation and gender identity.” *Id.* at 16 (quoting *Arizona v. Biden*, 31 F.4th 469, 474 (6th Cir. 2022)). The Court’s “state-specific injunction,” *Arizona v. Biden*, 40 F.4th 375, 397 (6th Cir. 2022) (Sutton, C.J., concurring), thus protects the 20 Plaintiff States in this case but does not apply

nationwide to avoid “burden[ing] the States that did not join this litigation,” ECF No. 86 at 46 n.18. Plaintiff States will take appropriate action if the Defendants attempt to implement the challenged guidance against Plaintiff States, including the political subdivisions, employers, citizens, and residents within their jurisdiction.

Dated: August 30, 2022

Respectfully submitted,

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